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Supreme Court of the United States.

October Term, 1969.

No. 349

SALVATO F. SILVERIO,
Petitioner,

v.

MUNICIPAL COURT OF THE CITY OF BOSTON AND CITY OF MEDFORD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI.

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SALVATO J. SILVERIO,
Petitioner,
v.
MUNICIPAL COURT OF THE CITY OF BOSTON
AND CITY OF MEDFORD,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

Salvato J. Silverio prays that a writ of certiorari issue to review a judgment of the Supreme Judicial Court of Massachusetts.

Citations to Opinions Below.

The opinion of the Supreme Judicial Court, reported at 1969 Mass. Adv. Sh. 691 and 247 N.E. 2d 379, is printed in Appendix A hereto. The opinion was originally dated April 10, 1969, but, after request for rehearing, was modified on April 18, 1969.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3). See *Garrity* v. *New Jersey*, 385 U.S. 493. The

judgment of the Supreme Judicial Court was entered on April 10, 1969, and rehearing was denied on April 18, 1969.

Questions Presented.

1. Does the Fourteenth Amendment forbid a city from discharging a police officer for refusing to answer questions relating to his testimony before a grand jury where his refusal was based on the advice of an attorney who reasonably believed that the officer would subject himself to contempt proceedings by answering such questions?

2. Do the Fifth and Fourteenth Amendments forbid a city from discharging a police officer for refusing to tell his superior whether he had claimed his constitutional privilege against self-incrimination in a grand jury proceeding?

3. Do the Fifth and Fourteenth Amendments forbid a city from discharging a police officer for claiming his constitutional privilege against self-incrimination in refusing to answer questions about the extent of his associations with certain persons, his knowledge of their "criminal record" and his conduct before a grand jury?

4. Can a city discharge a police officer for claiming his First Amendment rights in refusing to tell his superior whether he knew or associated with certain persons, the extent of his association and his knowledge, if any, of their criminal records?

5. Does the Fourteenth Amendment forbid a city from discharging a police officer on the grounds that his conduct violated regulations that clearly fail to include such conduct within their scope?

Statutes Involved.

The First, Fourth, Fifth and Fourteenth (section 1, only), Amendments to the Constitution of the United States; sections 43 (*a*), 43 (*b*) and 45 of chapter 31, section 6 of chapter 211, and section 4 of chapter 249 of the General Laws of the Commonwealth of Massachusetts; and sections 16, 92 and 93 of chapter III of the Rules and Regulations of the Police Department of the City of Medford are printed in Appendix B.

Statement.

At the outset we wish to make one point clear. Petitioner has never been convicted of or even indicted for any crime (R. 23[1]). On March 30, 1965, when petitioner was discharged as a police officer, he had been a member of the Medford police force for over sixteen years (R. 5) and, in the words of one of his superiors, a "model police officer." When he testified before a grand jury in March of 1965, he may or may not have claimed his privilege against self-incrimination; no record of any such claim of privilege appears in the record and whether he claimed it or not would be immaterial to these proceedings. Petitioner was discharged only for refusing, on the basis of certain constitutional and statutory privileges and duties, to answer questions propounded by his superior (A, 22).

The Supreme Judicial Court upheld this discharge, but to see how the case reached that court requires at least an outline of Massachusetts procedures for review in civil service cases. On March 22, 1965, the City Manager of

[1] The letter "R" followed by a number is a reference to pages in the printed record in the Supreme Judicial Court. The letters "A," "B," "C" and "D" followed by numbers refer to appendices to this petition.

Medford, as chief administrative officer of the city (see *City Manager of Medford* v. *State Labor Relations Commission,* 353 Mass. 519, 521, fn. 3, 233 N.E. 2d 310 (1968)) and appointing authority within the purview of Mass. G.L. c. 31, § 43, notified the petitioner to appear on March 26, 1965, at a hearing on whether he should be "discharged, removed or suspended from office" (R. 15). The City Manager noted in his letter that he was acting in "accordance with the provisions of Chapter 31, Section 43(a) of the General Laws of the Commonwealth of Massachusetts" (R. 15). A hearing was held by the City Manager, and after this hearing petitioner was discharged allegedly "[for] just cause" (R. 17).

Petitioner then exercised his right of appeal to the Civil Service Commission of the Commonwealth of Massachusetts (R. 6). This appeal, which was timely (R. 6), was brought pursuant to Mass. G.L. c. 31, § 43 (*b*). The Civil Service Commission appointed a hearing officer (see *Clooney* v. *Civil Service Commission,* 349 Mass. 589, 211 N.E. 2d 230 (1965)) who, after hearing, recommended that the decision of the City Manager be "sustained" (R. 6, 23). "On June 2, 1965, the [Civil Service] Commission voted to adopt the findings of the hearing officer and affirmed the action" of the City Manager (R. 6, 24).

By statute, Mass. G.L. c. 31, § 45, petitioner's next step was a timely (R. 6) appeal to the District Court in the district in which he lived or to the Municipal Court of the City of Boston. He chose the latter, which on October 25, 1967, heard his appeal on the law and on evidence and on November 7, 1967, entered a decision affirming the decision of the Civil Service Commission (R. 6).

Although the statute under which petitioner appealed to the Municipal Court expressly states that decisions of that court shall be "final," the Supreme Judicial Court of Massachusetts has long held that such finality does not pre-

clude review by common law certiorari to correct errors of law.[2] *Whitney* v. *Judges of District Court of Northern Berkshire,* 271 Mass. 448, 458, 171 N.E. 648 (1930). Certiorari in Massachusetts issues out of the Supreme Judicial Court for Suffolk County (Mass. G.L. c. 249, § 4), "popularly referred to as the single justice sitting or session."[3] Mottla, Civil Practice, vol. 9 (Mass. Practice Series), § 33, p. 33. On November 15, 1967, petitioner filed for certiorari in the Supreme Judicial Court for Suffolk County (R. 1-4). It is interesting to note that, given the circuitous route of civil service review in Massachusetts, this was petitioner's first opportunity, more than three years after his dismissal, to raise constitutional issues in such manner that they would be preserved on the record, and petitioner availed himself of it by specifying these issues in his petition (R. 3-4).

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[2] The opinion of the Supreme Judicial Court in the instant case (A, 1) notes that the "petition for writ of certiorari brings before us the issue whether there was error of law apparent on the record including whether the evidence was sufficient in law" (A, 1).

[3] Despite the statement in *Keenan, petitioner,* 310 Mass. 166, 180, 37 N.E. 2d 516 (1941) that "the Supreme Judicial Court is primarily, though not exclusively, an appellate court," the individual justices of that court have unusually broad original jurisdiction. It includes (*inter alia*) concurrent original jurisdiction with the Superior Court of "all cases and matters of equity cognizable under the general principles of equity jurisprudence" (Mass. G.L. c. 214, § 1) and petitions for writs of mandamus, habeas corpus, quo warranto and certiorari (Mass. G.L. c. 213, § 1A). The court in which the single justice sits is known as the Supreme Judicial Court for the County of Suffolk, sometimes called the "county court" to distinguish it from the full court, which is primarily an appellate body. See *Nason* v. *Superintendent of Bridgewater State Hospital,* 353 Mass. 604, 614, 233 N.E. 2d 908 (1968); *Civitarese, petitioner,* 353 Mass. 310, 312, 231 N.E. 2d 360 (1967). This court has had recent occasion to review two cases originating in the "county court." *First Agricultural National Bank of Berkshire County* v. *State Tax Commission,* 392 U.S. 339; *Arsenault* v. *Commonwealth of Massachusetts,* 393 U.S. 5.

Certiorari in Massachusetts is customarily heard on the petition and a return.[4] In the instant case, after expending considerable effort, as the docket entries will show, to obtain a proper return, petitioner entered into a statement of agreed facts (see *Massachusetts Feather Co.* v. *Aldermen of Chelsea,* 331 Mass. 527, 528, 120 N.E. 2d 776 (1954)) with the respondent and the City of Medford (R. 5), which had been allowed to intervene in the proceedings. Mass. G.L. c. 249, § 4. Upon the petition, this stipulation and the return,[5] the single justice reported the case without decision to the full bench of the Supreme Judicial Court (R. 1). Mass. G.L. c. 211, § 6. See *Real Properties, Inc.* v. *Board of Appeal of Boston,* 319 Mass. 180, 181, 65 N.E. 2d 199 (1946).

The route which this case took to the Supreme Judicial Court having been roughly mapped out, we may now state the pertinent facts. Some time shortly before March 16, 1965, petitioner testified before a grand jury (R. 11, 12). On that date he received a letter from the acting Chief of Police of the City of Medford to report to his office at 2 p.m. the next day, March 17, 1965 (R. 5, 7). The letter contained no reason as to why the petitioner was to report (R. 7). Petitioner obeyed the order and reported, accompanied by counsel (R. 5). The City Solicitor was also present (R. 5). A strange scene ensued. Although the City Solicitor, a stenographer, and the head of the Vice Squad

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[4] *Farmington River Water Power Co.* v. *County Commissioners,* 112 Mass. 206, 214 (1873); *Real Properties, Inc.* v. *Board of Appeal of Boston,* 311 Mass. 430, 431, 42 N.E. 2d 499 (1942).

[5] It is doubtful that the Supreme Judicial Court will agree to certify the return as part of the record on this petition, since, the return not having been printed (R. 1), there is only one copy. However, the only material fact shown in the return but not in the agreed statement of facts is the statement by petitioner's superior, *supra,* that he was a model police officer.

were present at this hearing (R. 9), the acting Police Chief made a sustained effort to have counsel for petitioner leave the room (R. 8-10) and even said to petitioner, "In this interview here, we are not having lawyers present. This is a departmental talk in regards to some questions which we have here for you" (R. 8). A stenographer who accompanied petitioner was, at the insistence of the City Solicitor, required to leave the room (R. 10).

Petitioner's attorney informed the acting Chief that petitioner was "ready to answer any questions that are asked" (R. 8); however, in the course of questioning, the acting Chief at one point began to ask petitioner questions (R. 10-14) about whether he knew certain persons and about his conduct before a grand jury. Thereupon, petitioner's counsel advised the acting Chief: "You are now under a domain of grand-jury proceeding. . . . you do not have any right to go into any grand-jury procedure" (R. 11). Counsel advised petitioner to stand mute to all questions that would cause him to repeat or divulge his testimony or conduct before the grand jury (R. 11, 13, 14). Petitioner accepted his counsel's advice (R. 11-14). The questions which petitioner refused to answer are set forth in footnote 1 (A, 22-23) of the opinion of the Supreme Judicial Court and are found in pages 10 through 14 of the printed record.

The questions could be placed into three basic categories. The first category of questions involved petitioner's knowledge of and degree of acquaintance with three named persons including questions as to whether they had criminal records. The second category of questions concerned petitioner's conduct and testimony before a grand jury including questions as to whether he had claimed his Fifth Amendment privileges before the grand jury. The third category includes only a single question: "Do you have

any information regarding any felony or any person wanted on a felony charge?" To this petitioner answered, "No"[6] (R. 14). For refusing to answer these questions, petitioner was discharged as a police officer (R. 15-20). The City Manager, in discharging petitioner, stated that he had conducted himself "in a manner unbecoming a Police Officer" and had been "insubordinate" in that these questions were pertinent to whether petitioner had complied with sections 16, 92 and 93 of chapter 3 of the Rules and Regulations of the Police Department of the City of Medford (R. 18, 19). These rules are printed in the statutory appendix.

In his petition for writ of certiorari in the Supreme Judicial Court, petitioner alleged that his refusal to answer these questions was proper for several reasons, but obviously we need only be concerned with the federal constitutional grounds at this point. These grounds (all explicitly founded upon the Fourteenth Amendment and, where appropriate, provisions of the Bill of Rights) were that "Petitioner was under no obligation to answer the questions which he refused to answer during the pendency of grand jury proceedings inasmuch as for answering such questions he could have been punished for contempt" (R. 3); that "Petitioner could not be removed for refusing on the advice of counsel honestly given, to answer the questions asked of him by the Acting Police Chief during the pendency of grand jury proceedings" (R. 3); that "there is no showing that the Petitioner's refusal to answer the questions asked of him by the acting Police Chief was in violation of the police regulations of the City of Medford

[6] It is true that petitioner later changed his answer to say that he was standing mute, but since this was a departmental inquiry (R. 8) and not an official court record and since petitioner was not under oath, the change in answer was obviously of no consequence and the acting Chief obtained the information he wanted.

or of any of the general duties as a policeman''[7] (R. 3-4); and that ''Petitioner, by answering the questions asked of him by the Acting Police Chief, could have subjected himself to criminal prosecution'' (R. 4).

The Supreme Judicial Court dealt directly with only one of these constitutional questions, petitioner's privilege against self-incrimination (A, 26-29). It dealt with the questions of whether petitioner could have subjected himself to contempt proceedings by answering the questions (A, 25-26) and whether he could properly have relied upon his attorney's advice (A, 29-30), but it did not in its opinion consider the constitutional issues raised thereby, though these had been fully briefed and argued. The court brushed aside any question as to the Police Regulations of the City of Medford by noting (A, 24) that petitioner was under a plain duty ''apart from the rules of the Medford Police Department'' to answer the questions of his superior officer, and it did not even mention the First Amendment questions in its opinion.

The Supreme Judicial Court, finding that there was no error of law in the affirming of petitioner's discharge, ordered the petition dismissed on April 10, 1969 (A, 30). On April 14, 1969, petitioner filed a written request for rehearing, a copy of which is printed in Appendix C hereto. On April 15, 1969, the Chief Justice of the Supreme Judicial Court, by letter, informed petitioner that his request had been received and would be considered by the full court. On April 18, 1969, the Chief Justice informed petitioner that his request had been considered and denied but that there was a change in point 5 of the opinion. Both letters

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[7] Petitioner alleged that requiring him to answer these questions pursuant to these regulations or any other provision would be unconstitutional in providing no reasonable and ascertainable standards for official action and also in violating his right to privacy (R. 4).

of the Chief Justice are printed in Appendix D hereto. It will be noted that the request for rehearing (C, 37-38) called the court's attention both to a misstatement of fact and to the failure of the court to consider petitioner's right-of-privacy questions. The revised opinion of the court corrected the misstatement to which petitioner had called attention but did not make any effort to consider the First Amendment questions.

Reasons for Granting the Writ.

I. PETITIONER COULD NOT BE DISCHARGED FOR REFUSING TO ANSWER QUESTIONS OF HIS SUPERIOR WHEN, BY ANSWERING THESE QUESTIONS, PETITIONER HAD GOOD CAUSE TO BELIEVE HE WOULD SUBJECT HIMSELF TO PUNISHMENT FOR CONTEMPT OF GRAND JURY PROCEEDINGS. (Applicable to question No. 1.)

The opinion of the Supreme Judicial Court states (A, 25): "We assume that persons other than grand jurors making disclosure of facts within the restrictions stated in [*Commonwealth* v. *Hill,* 11 Cush. 137] could, in some circumstances, be held in contempt for interfering with the grand jury as a constituent part of the court. See *Commonwealth* v. *McNary,* 246 Mass. 46, 50-51." A little later the court states that petitioner's "refusals to answer were not justified because of the possibility that he would be in contempt for breaking the secrecy of the grand jury." Petitioner submits that, as a proposition of constitutional law, the last quoted sentence is rather patently erroneous. The possibility that he would be in contempt for breaking the secrecy of the grand jury was indeed a sufficient ground for his refusal to answer the questions. In this context, it should be noted that petitioner consulted an attorney who consistently advised him that he was not allowed to answer

the questions put to him by his superior (R. 11; A, fn. 1, 22-23, 29; Appendix A to Petitioner's Reply Brief in Supreme Judicial Court).

Whether petitioner had reason to believe that he might be punished for contempt if he answered his superior's questions is an issue to be decided, not by the law as it stands now that the Supreme Judicial Court has given its opinion in the case at bar, but on the law as it stood when petitioner, with advice of counsel, was forced to make his choice. *Murphy* v. *Waterfront Commission of New York Harbor,* 378 U.S. 52, 79-80. If, as the opinion of the Supreme Judicial Court in the instant case may be read to indicate, petitioner could not have been punished for contempt for answering the questions which he refused to answer on March 17, 1965, the prior law of Massachusetts gave no such indication. On the contrary, in at least two Massachusetts cases, persons were held in contempt for doing no more than informing grand jurors that two previous grand juries before which they had testified had failed to indict them. *Commonwealth* v. *McNary,* 246 Mass. 46, 50, 53, 140 N.E. 255 (1923); *Commonwealth* v. *Chmielinski,* 246 Mass. 55, 56, 140 N.E. 258 (1923). In *New Hampshire Fire-Insurance Co.* v. *Healey,* 151 Mass. 537, 538, 24 N.E. 913 (1890), the precise question was whether a district attorney could testify before a petit jury as to testimony that one of the parties had given to a grand jury. The Supreme Judicial Court held the district attorney's testimony admissible; it did so, however, strictly on the basis that the need for secrecy had passed. The clear implication of the opinion is that the district attorney would not be allowed to divulge the grand jury's evidence under circumstances in which the jurors themselves were bound to keep it secret.

The instant opinion of the Supreme Judicial Court cites (A, 25) *Commonwealth* v. *McNary, supra,* but makes no ef-

fort to distinguish it. About *New Hampshire Fire Insurance Co:* v. *Healey, supra,* the court says (A, 26): "The negative implication of that case does not bear on police department inquiry as to whether an officer had been before the grand jury, had testified and had refused to testify because of his Fifth Amendment privilege." But petitioner could have no way of knowing this on March 17, 1965, and if the opinion of the Supreme Judicial Court is in retrospect logically consistent with the previous law on this subject, it could not have been divined by petitioner at the time he had to make his choice.[8] See *National Association for the Advancement of Colored People* v. *Alabama ex rel. Patterson,* 357 U.S. 449, 456-457.

The court also seems to say that petitioner could not have been punished for contempt because some of the questions which he refused to answer related only to his conduct rather than his testimony before the grand jury while the others were not direct inquiries into his testimony (A, 25-26). Again, the Supreme Judicial Court may be undoubtedly correct in its hindsight statement of what the law of Massachusetts really was, but it should be noted that until this time the Massachusetts case law indicated that a witness before a grand jury was barred not only from discussing what was said but also from disclosing "what took place." *New Hampshire Fire Insurance Co.* v. *Healey, supra,* 538; *Commonwealth* v. *Chmielinski, supra; Commonwealth* v.

[8] There was also a considerable body of law from other jurisdictions holding that a witness before a grand jury is bound to secrecy as to all matters pertinent thereto. See *Arlington Glass Co.* v. *Pittsburgh Plate Glass Co.,* 24 F.R.D. 50, 52 (N.D. Ill); *Widener* v. *Croft,* 184 So. 2d 444, 445-446 (Fla. App.); *State* v. *Fassett,* 16 Conn. 457, 470-471; *State* v. *Brewster,* 70 Vt. 341, 347. In *Goodman* v. *United States,* 108 F. 2d 516, 518-520 (C.C.A. 9, 1939), the appellant was actually punished for contempt for doing what the Supreme Judicial Court in the present case felt was petitioner's duty.

McNary, supra. Petitioner also submits that it is clear on the record that the intention of petitioner's superior had been to ask about petitioner's testimony. Petitioner's refusal to answer the acting Chief's questions commences with the question (R. 10): "Do you know William McGovern of 230 Gaston Street, Medford?" To this question, counsel for petitioner replied in effect that the interrogator was trenching upon grand jury testimony and the petitioner was advised not to answer (R. 11). The acting Chief admitted as much by replying: "If any questions are asked regarding grand jury, you advise him [the petitioner] to stand mute" (R. 11) and by making no effort to clarify the scope of his question.

Petitioner, therefore, submits that there was a reasonable possibility that by answering his superior's questions he could have left himself open to punishment for contempt. As already noted, the Supreme Judicial Court's opinion admits of this possibility (A, 26). In these circumstances, petitioner was, in the words of *Garrity* v. *New Jersey,* 385 U.S. 493, 496, given "a choice between the rock and the whirlpool." On March 17, 1965, petitioner's choice was to speak and risk jail for contempt or remain silent and risk his job as a police officer. That the due process clause of the Fourteenth Amendment forbids a state from requiring a person, by any means whatever, to pursue a course of conduct for which he may later be amerced has been too thoroughly settled in a wide variety of cases and circumstances to admit of any serious doubt. See, in addition to the *Garrity* case, *Raley* v. *Ohio,* 360 U.S. 423, 426; *Baggett* v. *Bullitt,* 377 U.S. 360, 374; *Murphy* v. *Waterfront Commission of New York Harbor, supra,* 55; *Western Union Telegraph Co.* v. *Pennsylvania,* 368 U.S. 71; *Stevens* v. *Marks,* 383 U.S. 234, 243; *Gardner* v. *Broderick,* 392 U.S. 273, 278. In holding otherwise, the Supreme Judicial Court

committed clear and reversible error and certiorari should be granted to correct this error.

II. THE SUPREME JUDICIAL COURT ERRED IN HOLDING THAT PETITIONER'S REFUSAL TO ANSWER MIGHT NOT BE JUSTIFIED ON THE GROUND THAT HIS ANSWERS MIGHT HAVE TENDED TO INCRIMINATE HIM. (Applicable to questions Nos. 2 and 3.)

The Supreme Judicial Court conceded (A, 26-27) that questions concerning petitioner's privilege against self-incrimination were properly before it. The court also cited the language of *Gardner* v. *Broderick*, at page 278, *supra*, holding that if a policeman "had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution . . . the privilege against self-incrimination would not have been a bar to his dismissal" (A, 27). Nowhere, however, does the Supreme Judicial Court find that the questions which petitioner refused to answer specifically, directly and narrowly related to the performance of the petitioner's official duties.

The opinion below claims (A, 28) that the questions relating to whether the petitioner knew certain persons were "reasonably designed to inform his superior whether he had failed to report matters which he should have reported, in particular, his knowledge of an auto theft ring involving three other policemen." But this statement is somewhat fanciful. The Civil Service Hearing Examiner inferred but did not find that these were questions involving petitioner's "knowledge of certain persons . . . in some way involved in an auto theft ring." Even if, however, we treat the Hearing Examiner's inference as a finding, Mr.

Justice Whittemore clearly goes far beyond that finding when he states that petitioner had failed to report "his knowledge of an auto theft ring." That petitioner may have known these persons does not lead to the conclusion that he also knew that they were involved in an auto theft ring. Indeed, as has already been pointed out, when the acting Chief confronted petitioner directly and asked him whether he had any information regarding any felony or any person wanted on a felony charge, petitioner replied that he did not (R. 14). This was the only question which could even conceivably have been said to pertain specifically, directly and narrowly to the petitioner's official duties, and this question petitioner answered.

Petitioner was discharged not only for claiming the Fifth Amendment rights generally but for refusing to tell his superior, among other things, whether he had claimed his privilege against self-incrimination in grand jury proceedings (R. 13; A, 28-29). On this point the Supreme Judicial Court stated (A, 29):

> "Certainly, a police officer who has claimed or claims the privilege as to a matter under current investigation could be deemed unfit to work in any aspect of his job related to that or to a similar investigation. His superiors, therefore, had a right to ask if the claim had been made and the obligation of Silverio's job was to answer."

To begin with, the Supreme Judicial Court's statement is based upon facts that simply do not appear anywhere in the record. There is no showing that the questions put to petitioner involved "a matter under current investigation." The acting Chief was not asking these questions to determine whether the petitioner should or should not be allowed to work or to continue in any current or pending

investigation. The record points to nothing more than a bald attempt on the part of the acting Chief to determine ion proceeded, his opinion would have nevertheless been in grand jury in order to subject him to disciplinary proceedings for claiming that privilege. Petitioner was discharged because, in the opinion of the hearing officer assigned by the Civil Service Commission (R. 23), petitioner's "refusal to cooperate with his superior officer in his investigation, has resulted in his usefulness in such a sensitive area as police work [*sic*] nonexistent" (R. 23). Even if, however, there were evidence in the record to support the factual hypothesis upon which Mr. Justice Whittemore's opinion proceeded, his opinion would have nevertheless been in error as to the law. The true rule is that no inference whatsoever could be drawn from the fact that petitioner claimed his privilege before a grand jury and, therefore, petitioner could not be discharged from employment for refusing to state whether he had in fact claimed the privilege.[9] *Grunewald* v. *United States*, 353 U.S. 391, 423-424.

Thus, in plain and simple English, the Supreme Judicial Court was wrong in holding that petitioner could be discharged for claiming his privilege in refusing to answer all of his superior's questions (except for the last) because none of these questions are shown to have pertained specifically, directly or narrowly, to his official duties [10] and doubly

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[9] If there is an exception to this rule when a police officer is testifying before a grand jury as part of his official duties, it has no relevance to the instant case, where the record is clear that these were not the circumstances of petitioner's appearance before the grand jury.

[10] See, in addition to *Gardner* v. *Broderick*, *supra*, *Uniformed Sanitation Men Assn., Inc.* v. *Commissioner of Sanitation of the City of New York*, 392 U.S. 280, 284-285. The Supreme Judicial Court seems to misread and misapply the *Gardner* and *Uniformed Sanitation Men* cases when it points out that in the instant case "no testimony was coerced by threat of discharge and no request

wrong in further holding that petitioner could be discharged for refusing to tell his superior whether he had claimed his privilege. Certiorari should be granted to correct this error.

III. The Supreme Judicial Court Erred in Refusing to Rule that Petitioner's Failure to Answer Questions Pertaining to his Knowledge of or Association with Certain Persons is Not a Constitutional Ground for his Removal under the First, Fourth and Fourteenth Amendments of the Constitution of the United States. (Applicable to question No. 4.)

We have already noted that petitioner raised his argument about right of privacy and freedom of association in his petition, argued it in his brief in the Supreme Judicial Court, and in his petition for rehearing called to the court's attention its failure to deal with this issue. Petitioner submits that it was clearly and appropriately raised and that, the failure of the Supreme Judicial Court to pass upon it notwithstanding, he has a right to ask to have it resolved in this court. See *Epperson* v. *Arkansas,* 393 U.S. 97, 101-102.

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for waiver of immunity was made" (A, 29). That the city claims and indeed has exercised authority to discharge petitioner from employment for not answering his superior's questions is clearly "coercion," however subtle or well-mannered. *Garrity* v. *New Jersey, supra,* 496. It is immaterial that "no request for waiver of immunity was made" in this case. Such a request was germane to the *Gardner* case because of the specific provisions of section 1123 of the New York City Charter, quoted at page 75, fn 3. There can be no doubt that under Massachusetts law, petitioner could have been criminally prosecuted on the basis of any incriminating statements made to the acting Chief in the course of his interrogation. *Ross* v. *Crane,* 291 Mass. 28, 32-33, 195 N.E. 884 (1935); *Commonwealth* v. *Benoit,* 347 Mass. 1, 3, 7, 196 N.E. 2d 228 (1964). Any "immunity" petitioner may have enjoyed would have been "waived" by answering the questions.

Under the First, Fourth and Fourteenth Amendments of the Constitution of the United States, all persons, including public employees, enjoy a right that has been labelled "freedom of association" and "privacy in one's associations." *Griswold* v. *Connecticut,* 381 U.S. 479, 483. Whatever else may be said of this freedom, it clearly includes the right of a person under its protection to refuse to divulge his private associations. *Konigsberg* v. *State Bar of California,* 353 U.S. 252, 270, 271; *Sweezy* v. *New Hampshire,* 354 U.S. 234, 248-250; *National Association for the Advancement of Colored People* v. *Alabama,* 357 U.S. 449, 462; *National Association for the Advancement of Colored People* v. *Button,* 371 U.S. 415, 430, 431. It follows that the refusal of petitioner to state whether he knew Messrs. Howard, Penta and McGovern and the extent of his associations with them (R. 10-12) was well within his right under the First and Fourth Amendments to the Constitution of the United States as these Amendments are incorporated in the Fourteenth Amendment and that he could not be discharged for exercising them. The contrary holding implicit in the opinion of the Supreme Judicial Court is error, and certiorari should be granted to reverse its judgment.

IV. Petitioner could Not be Discharged for his Alleged Violations of Sections 16, 92 and 93 of Chapter III of the Rules and Regulations of the Police Department of the City of Medford because Petitioner's Conduct was Not within the Scope of these Regulations. (Applicable to question No. 5.)

The Hearing Examiner in his report cited three sections of the Rules and Regulations of the Medford Police Department (R. 22), and then went on to rule impliedly that peti-

tioner had violated these Regulations [11] (R. 22-23). In fact, the text of these regulations totally failed to sustain the Hearing Examiner on this point. Section 16 requires policemen to report crimes, suicides, fires, accidents and "all [other] important happenings, complaints and information of which the [police] Department takes cognizance." The withholding of such information subjects a policeman to disciplinary proceedings. None of the questions which petitioner refused to answer on March 17, 1965, was in any way relevant to any "happenings, complaints, and information" which petitioner was obligated to report.

Section 92 requires policemen to report "information regarding any felony charge, or any person wanted on a felony charge." The regulation was apparently intended to help the police track down wanted and missing persons. There is not the slightest hint in the record (nor could there be) that the persons whom the petitioner was asked whether he knew were missing. In any event, even if these persons were wanted on a felony, or, as the Hearing Examiner inferred, were in some way involved in an auto theft ring, petitioner did not refuse to give the acting Chief

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[11] Perhaps seeing that petitioner's conduct could not possibly fall within the scope of these Regulations, the Supreme Judicial Court attempted to shift the grounds of decision from a breach of petitioner's duty under the Regulations to breach of "a duty by virtue of his office" (A, 24). For reasons that have already been discussed in Argument II, *supra*, the record does not show any lack of cooperation by petitioner in "the prevention and detection of crime and the apprehension of criminals." *Huntoon* v. *Quincy*, 349 Mass. 6, 14, 206 N.E. 2d 63 (1965). However, from the beginning, petitioner's discharge has been grounded upon his noncompliance with the Rules and Regulations (R. 16-19). An attempt to uphold it on any other grounds, petitioner submits, would be constitutionally futile, since he had no notice thereof. *Cole* v. *Arkansas*, 333 U.S. 196, 200-201.

information concerning them. Indeed, he was never asked to give such information. He merely refused to state whether he knew these people socially or otherwise.

Section 93 requires that members report "all suspected violations" and "information they may get about any violation or suspected violation." None of the questions that petitioner refused to answer even remotely related to violations and suspected violations.

The answers to the questions which the acting Chief asked could not possibly have helped him "to ascertain if [*sic*]" petitioner "had failed to comply with the provisions of Chapter III, Section 92," section 93 or section 16; yet petitioner was discharged on precisely this charge (R. 16, 18-19).

The construction of these Regulations was a question of law for the Supreme Judicial Court, *Lapenas* v. *Zoning Board of Appeals of Brockton*, 352 Mass. 530, 533, 226 N.E. 2d 361 (1966). By affirming petitioner's discharge on the basis of these Regulations, the Supreme Judicial Court impliedly held that they could be constitutionally applied to remove petitioner from office.

Petitioner submits that this ruling was error. A statute or regulation cannot be applied to control or punish conduct when, as applied to that conduct, its meaning is so vague and hopelessly obscure that men of common intelligence would never be able to discern it. *Cramp* v. *Board of Public Instruction of Orange County*, 368 U.S. 278, 287. See cases cited in *Barenblatt* v. *United States*, 360 U.S. 109, 137, fns. 2, 3 and 4 (dissent). Petitioner submits that the police regulations here in question were not only unconstitutionally vague as applied to his refusal to answer the acting Chief's questions but that they unambiguously failed to include his refusal within their scope. If a person cannot constitutionally be punished because his

conduct supposedly violated a law that is merely vague, *a fortiori* he cannot be punished for "violation" of a law that is clearly inapplicable. *Thompson* v. *Louisville,* 362 U.S. 199, 205-206. The implied holding of the Supreme Judicial Court that petitioner could be removed for not complying with these regulations in these circumstances was, therefore, error, and certiorari should be granted to correct it.

Conclusion.

A writ of certiorari should issue to review and reverse the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts.

Respectfully submitted,
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APPENDIX A.

Opinion of the Supreme Court of the Commonwealth of Massachusetts.

SALVATO J. SILVERIO *vs.* MUNICIPAL COURT OF THE CITY OF BOSTON. (1969 Mass. Adv. Sh. 691, 247 N.E. 2d 379.)

WHITTEMORE, J. The petitioner on March 30, 1965, was discharged as a police officer in the city of Medford by the city manager who was the "appointing authority" (G. L. c. 31, § 43 [a]). On appeal to the Civil Service Commission (c. 31, § 43 [b], a hearing officer made findings. The Commission, on June 2, 1965, adopted the findings and affirmed the discharge. On petition under c. 31, § 45, the Municipal Court of the City of Boston reviewed the action of the city manager and the Commission to determine "whether . . . upon all the evidence such action was justified," and on November 7, 1967, entered an order upholding the decision.

This petition for writ of certiorari brings before us the issue whether there was error of law apparent on the record including whether the evidence was sufficient in law. *Sullivan* v. *Municipal Court of the Roxbury Dist.* 322 Mass. 566, 573-574.

The city manager had discharged Silverio for his refusal to answer questions asked of him by his superior, Captain John B. O'Leary. A letter from Captain O'Leary to Silverio had requested Silverio to report to the captain's office on March 17, 1965, at 2 P.M. Silverio came with his attorney. The questions and some of the colloquy are set out in the margin.[1]

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[1] Before the questioning began Silverio's attorney said, "This was on the front pages of the weekly newspaper and the three parties that were named are all under indictment. It takes it out of the realm of a mere departmental inquiry." In the following excerpt from the transcript where no answer is shown after a

In a statement of agreed facts the parties stipulated that the evidence presented to the Commission's hearing officer was sufficient to warrant the findings of fact made by him.

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question there was a statement by Silverio's attorney to the effect that he stood mute.

O'LEARY: "Now, the purpose is . . . to find out what . . . you can tell me as your superior officer in the discharge of your duties under the Rules and Regulations of the Police Department as to whether things have gone on in this city which you should have reported. You have had a Rule Book given to you?" SILVERIO: "Right." O'LEARY: "Do you know William McGovern of 230 Gaston Street, Medford?" THE ATTORNEY: "You are now under a domain of grand jury proceeding. As long as the record shows that you are going into that, you do not have any right to go into any grand jury procedure, as you know . . ." O'LEARY: "Have you ever been to his house in Medford? Have you ever visited his place of business in Charlestown? Have you ever done any business with him? . . . [Five similar unanswered questions about Richard M. Penta and Thomas Howard.] Do you know whether or not they have a criminal record? You were recently summoned to appear before the grand jury, is that true? Did you report to a grand jury at some time? . . . Were you sworn as a witness in the grand jury room? Did you take the witness stand in the grand jury room? Were you asked a question or questions? Did you refuse to testify as to any questions that were asked you? . . . Do the questions that you refused to testify to have anything to do with suspected automobile thefts or receiving stolen property, namely, automobiles, in connection with people known to you, including yourself?" THE ATTORNEY: "He has been instructed not to discuss any grand jury questions with anyone, including counsel, and further stands mute by the advice of counsel." O'LEARY: "Did you claim the Fifth Amendment to any questions asked you before the grand jury?" (The attorney made the same statement.) O'LEARY: "Did you refuse to testify before the grand jury on the grounds that it might incriminate you?" (The attorney made a similar statement.) O'LEARY: "Do you have any information regarding any felony or any person wanted on a felony charge?" SILVERIO: "No." O'LEARY: "Do you have any suspected violations you wish to report?" "Right in here, Mr. Gallagher [the City Solicitor] questions . . . [the attorney's] ability to have the officer answer 'No' and stand mute at the same time. After discussion . . . [the attorney] agreed that he would just stand mute."

The hearing officer found, inter alia, that the questions involved Silverio's "knowledge of certain persons who it can reasonably be inferred were in some way involved in an auto theft ring involving them and three other Medford policemen who were under indictment." The hearing officer, in effect, ruled that answering the questions would not have been violative of a duty to maintain the secrecy of grand jury proceedings, particularly where the information sought by the superior officer was only as to his conduct before the grand jury. He concluded, "I am cognizant of the fact that . . . [Silverio] was not . . . indicted . . ., but his insubordination and refusal to cooperate with his superior officer in his investigation has resulted in his usefulness in such a sensitive area as police work nonexistent."

1. Silverio was under a duty by virtue of his office to answer the questions. This is plain apart from the rules of the Medford Police Department that were in evidence and with which he was familiar.[2] "Important among the many duties of police officers . . . are the prevention and detection of crime and the apprehension of criminals." *Huntoon* v. *Quincy*, 349 Mass. 9, 14.

2. Failure to answer, unless required by an overriding duty, or constitutionally protected, was ground for discharge for the reasons stated by the hearing officer.

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[2] "Chapter III. Sect. 16. Members and employees of the Department shall communicate promptly to the Commanding Officer all crimes, . . . and all important happenings, complaints, and information of which the Department takes cognizance, which may come to their attention. . . .

"Sect. 92. Members having information regarding any felony, or any person wanted on a felony charge, shall immediately give all details to their Commanding Officer.

"Sect. 93. Members shall report all suspected violations coming to their attention, as well as all information they may get about any violation or suspected violation."

3. Answering the questions would have violated no duty of Silverio to maintain the secrecy of grand jury proceedings.

The only obligation as to secrecy directly imposed by statute is on the grand jurors. G. L. c. 277, §§ 5, 12 and 13. But even that does not prevent a grand juror from testifying that a certain person had not been a witness before a grand jury. *Commonwealth* v. *Hill,* 11 Cush. 137, 140. We do not overlook that in that case the testimony was given at a time when the need for secrecy had ended, but we agree with the respondent that the holding is not placed on that ground. In the *Hill* case, the court said that grand jurors may not "state, how any member . . . voted or the opinion expressed by their fellows or themselves upon any question before them, nor to disclose the fact that an indictment for a felony has been found against any person, not in custody or under recognizance, nor to state in detail the evidence on which the indictment is founded. . . . [W]e know of no authority which carries the rule of exclusion further, and we can see no ground of policy or sound reason for its extension. . . . It seems to us, therefore, that a member of a grand jury may testify to any fact, otherwise competent, which does not violate the restrictions above stated."

We assume that persons other than grand jurors making disclosure of facts within the restrictions stated in the *Hill* case, could, in some circumstances, be held in contempt for interfering with the grand jury as a constituent part of the court. See *Commonwealth v. McNary,* 246 Mass. 46, 50-51. But in *Commonwealth* v. *Geagen,* 339 Mass. 487, 497-498, we held that disclosure by State and Federal officials of what witnesses had testified to or would testify before the grand jury was not violative of the secrecy of the grand jury room and not ground for abatement.

Silverio's refusals to answer were not justified because of the possibility that he would be in contempt for breaking the secrecy of the grand jury. None of the questions asked for disclosure of any of the secrets of the grand jury room. Silverio's brief misstates the purport of the questions. He was not asked to invade the "secrecy as to his testimony" and the cases from other jurisdictions holding that he may not do so are beside the point. We note *New Hampshire Fire Ins. Co.* v. *Healey,* 151 Mass. 537, 538, holding that the district attorney might testify as to a witness's testimony before the grand jury because the need for secrecy had at that time passed. The negative implication of that case does not bear on police department inquiry as to whether an officer had been before the grand jury, had testified and had refused to testify because of his Fifth Amendment privilege. There was no implication of intention to ask what Silverio's testimony had been.

We assume that the questions that asked Silverio as to his acquaintance and association with three named persons, and their criminal records, may have been questions about facts to which he had testified or refused to testify before the grand jury. But that circumstance did not put a lock on Silverio's mind and tongue to bar his disclosure of the same facts to anyone else. Silverio's recital of those facts as facts known to him would in no sense have been a disclosure of grand jury proceedings. *Commonwealth* v. *Doherty,* 353 Mass. 197, 210-211.* (That a witness had testified before the grand jury would not justify his declining to talk with defence counsel.)

4. Silverio's refusal to answer may not be justified on the ground that his answers might have tended to incriminate him. We assume that this justification may now be asserted even though it was not expressed when the ques-

* Mass. Adv. Sh. (1967) 1327, 1338.

tions were put. *Commonwealth* v. *Prince,* 313 Mass. 223, 229-231, affd. 321 U. S. 158.[3]

The Supreme Court of the United States in *Gardner* v. *Broderick,* 392 U. S. 273, 278, held that it was improper to discharge a police officer for refusal to waive immunity following his being told that he would be discharged if he did not do so. The court also held, however, that if the policeman "had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution . . . the privilege against self-incrimination would not have been a bar to his dismissal."

In *Uniformed Sanitation Men Assn. Inc.* v. *Commissioner of Sanitation of New York,* 392 U. S. 280, 284-285, fifteen employees had been told that if they refused to testify on the ground of self-incrimination they would be discharged. Twelve had asserted the privilege and had been discharged. Three had answered the questions, denied the charges against them and had been suspended. Later they had refused to sign waivers of immunity before the grand jury and had been discharged on that ground. In reversing the decision below sustaining the discharges the court noted that New York "was seeking not merely an accounting of their use or abuse of their public trust, but testimony from their own lips which . . . could be used to prosecute them criminally." The court noted, however (p. 285), the "petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their con-

[3] It appears from pp. 16-17 and 21 of the record in the *Prince* case that the defendant did not claim the privilege when she refused to answer questions of the school attendance officer.

stitutional rights." Compare *Spevack* v. *Klein*, 385 U. S. 511; *Garrity* v. *New Jersey*, 385 U. S. 493.

Thus an employee knows that if he fails to divulge information pertinent to the issue of his use or abuse of his public trust he may lose his job. The fact of employment poses the continuing choice of whether to divulge such information. The Constitution of the United States, however, as we understand its construction, does not require that a public employer continue to employ in a position of public trust an employee who declines or renders himself unable to perform the duties of his position on the ground of the constitutional protection against self-incrimination. No threat or pressure of his superior coerces his choice. His choice is his own, even though it may be affected by his expectation that his superiors will perform their own public duties in the light of their appraisal of his conduct.

We agree with Mr. Justice Harlan in his concurrence in the *Gardner* and *Uniformed Sanitation* cases (392 U. S. at 285) that there is "in these opinions a procedural formula whereby . . . public officials may now be discharged . . . for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices. . . ."

Silverio contends that he was discharged because he failed to disclose whether he had claimed his Fifth Amendment rights before the grand jury and that that was, in effect, discharge for claiming these rights. We deem his discharge to have been on the broad ground that he failed to answer any questions concerning his conduct as a police officer. The inquiry was in two parts: (1) questions reasonably designed to inform his superior whether he had failed to report matters which he should have reported, in particular, his knowledge of an auto theft ring involving three other policemen; and (2) questions as to his conduct before the grand jury in their investigation of the

matter. The ground of discharge was his complete failure to perform his duty in this interrogation.

In any case, however, Silverio could have been discharged for his refusal to say whether before the grand jury he had claimed his privilege against self-incrimination. The essence of the inquiry was whether he had refused to answer questions about the theft of automobiles. The implications of this inquiry by his superior officer are no greater than those in a direct question as to whether he had knowledge of, or connection with, persons who had stolen automobiles. We assume Silverio had a right to refuse to answer such questions on constitutional grounds. We assume also that he could not have been discharged for claiming the privilege. But this is not that case. Whether Silverio had claimed his privilege against self-incrimination in respect of such a matter was the important concern of his superiors. Certainly, a police officer who has claimed or claims the privilege as to a matter under current investigation could be deemed unfit to work in any aspect of his job related to that or to a similar investigation. His superiors, therefore, had a right to ask if the claim had been made and the obligation of Silverio's job was to answer.

We rule that, notwithstanding the constitutional protection, Silverio was rightfully discharged for breach of duty. This occurred in the course of an official inquiry in which no testimony was coerced by threat of discharge and no request for waiver of immunity was made. He was not discharged because he claimed his right against self-incrimination as in the *Gardner* case; nor was incriminating testimony, obtained through threat of discharge, used against him as in the *Garrity* case.

5. Discharge of Silverio was not barred because his attorney advised him not to answer certain questions and as to most of them answered for him that he stood mute.

The only expressed ground for the advice as stated by the attorney was, "[Y]ou [Captain O'Leary] do not have any

right to go into any grand jury procedure." There was no claim that answering was barred by law, or by an effective policy such that Silverio would risk punishment if he answered. There is no finding that Silverio relied in good faith on advice that he was under an obligation not to answer because it would be illegal or improper to do so. Nothing in the record required such a finding. The Commission and the judge could conclude that the attorney had told Silverio that his appearance before the grand jury gave legal ground for refusing to answer and that the attorney would speak for him in asserting that ground and that, in fact, the refusal was otherwise based.[4] In such circumstances, Silverio's conduct was at the risk that there was nothing in the ground asserted and that no constitutional privilege would protect him. See *Sinclair* v. *United States*, 279 U. S. 263, 299 (conviction for failure to respond to questions of Congressional Committee). The court said, "There is no merit in appellant's contention that he is entitled to a new trial because the court excluded evidence that in refusing to answer he acted in good faith on the advice of competent counsel. The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt. There was no misapprehension as to what was called for. The refusal to answer was deliberate. . . . His mistaken view of the law is no defense."

6. No error being shown, an order shall enter in the county court dismissing the petition.

So ordered.

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[4] The judge was not required to come to a different conclusion by the testimony of the attorney in the Municipal Court, not in the certiorari record, but set out in an appendix to Silverio's reply brief, that the attorney, based on his understanding of the law, had told Silverio he could not answer as to anything pertaining to the Grand Jury.

APPENDIX B.

United States Constitution.

Articles of Amendment.

Article I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mass. General Laws.

CHAPTER 31.

SECTION 43. (*a*) Every person holding office or employment under permanent appointment in the official or labor service of the commonwealth, or of any county, city or town thereof, shall have unlimited tenure of office or employment, subject to the provisions of this chapter and the rules made thereunder. He shall not be discharged, removed, suspended for a period exceeding five days, laid off, lowered in rank or compensation, without his consent in writing, nor shall his office or position be abolished, except for just cause and for reasons specifically given him in writing. Before any action affecting employment or compensation referred to in the preceding sentence is taken, the officer or employee shall be given a written statement of the specific reason or reasons for the contemplated action, together with a copy of sections forty-three, forty-five and forty-six A, and shall be given a full hearing before the appointing authority on the specific reason or reasons given, of which hearing he shall have at least three days' written notice from the appointing authority, except in

cases of separation from service in the official or labor service, resulting from lack of work or lack of money or from abolition of positions, in which case at least seven days' written notice of hearing shall be given by the appointing authority. Within two days after completion of said hearing, the appointing authority shall give to the employee affected a written notice of his decision, stating fully and specifically the reasons therefor. (As amended through St. 1968, c. 637, § 3.)

(*b*) If within five days after receiving written notice of the decision of the appointing authority the person so discharged, removed, suspended, laid off, lowered in rank or compensation, or whose office or position was abolished, shall so request in writing, he shall be given a hearing before a member of the commission or some disinterested person designated by the chairman of the commission. Said hearing shall be commenced in not less than three nor more than ten days, and shall be completed within thirty days, after the filing of such request, unless, in either case, both parties thereto shall otherwise agree in writing, or unless a continuance is deemed necessary or advisable in the discretion of the hearing officer, and the findings shall be reported forthwith to the commission for action. The decision of the commission shall be in writing and notice thereof sent to all parties concerned within ten days after the filing of the report. If the commission finds that the action of the appointing authority was justified, such action shall be affirmed; otherwise, it shall be reversed and the person concerned shall be returned to his office or position without loss of compensation. The commission may also modify any penalty imposed by the appointing authority. (As amended through St. 1968, c. 637, § 4.)

SECTION 45. Within thirty days after action by the commission on a hearing provided for in section forty-three,

the person who was discharged, removed, suspended, laid off, transferred or lowered in rank or compensation, or whose office or position was abolished, may, if said action was affirmed by the commission, bring a petition in the municipal court of the city of Boston or in the district court within the judicial district of which such person resides, addressed to the justice of the court, praying that the action of the appointing authority and of the commission in discharging, removing, suspending, laying off or transferring him or lowering him in rank or compensation or abolishing his office, may be reviewed by the court, and, after such notice to the appointing authority and the commission as the court deems necessary, it shall hear witnesses, review such action, and determine whether or not upon all the evidence such action was justified. If the court finds that such action was justified the action of the appointing authority and of the commission shall be affirmed; otherwise they shall be reversed and the petitioner shall be reinstated in his office or position without loss of compensation. The decision of the court shall be final and conclusive upon the parties, and a copy of the decision shall be forwarded forthwith by the clerk of the court to the director. (As amended through St. 1955, c. 407, § 2.)

CHAPTER 211.

SECTION 6. Questions of law arising upon a trial or other proceeding, or upon a motion for a new trial by reason of an opinion, direction, order or refusal of one justice in matter of law, may be reserved for the consideration of the full court, and so much of the case as is necessary for understanding the question shall be reported. (As appearing in Ter. Ed.)

SECTION 4. A petition for a writ of certiorari to correct errors in proceedings which are not according to the course of the common law may be presented to a justice of the supreme judicial court, and he may, after notice, hear and determine the same. It shall be open to the petitioner to contend at the hearing upon the petition that the evidence which formed the basis of the action complained of or the basis of any specified finding or conclusion was a matter of law insufficient to warrant such action, finding or conclusion. The writ shall not be issued unless the petition therefor is presented within two years next after the proceedings complained of. It may be issued from the clerk's office in any county and shall be returnable as the court orders. The court at any time after the petition is presented may impose costs upon any party, may issue an injunction and may order the proceedings brought up; and, after they are brought up, may quash or affirm them, or may make such order, judgment or decree as law and justice may require. The powers conferred by the foregoing sentence shall apply also to a petition for a writ of mandamus and to an amended petition for either a writ of certiorari or a writ of mandamus under section one C of chapter two hundred and thirteen, subject in case of appellate proceedings, to the authority of the supreme judicial court to suspend the operation of any judgment or decree and to amend any order pending such appellate proceedings as is provided in equity by section twenty-two of chapter two hundred and fourteen. Where a petition is brought against a body or officer exercising judicial or quasi-judicial functions to prevent the body or officer from proceeding in favor of another party, or is brought with relation to proceedings already taken, such other party may be joined as a party respondent by the petitioner or on motion of the

respondent, or by petition to intervene. Such other party may file a separate answer or adopt the pleadings or return of the body or officer. Thereafter a final order in favor of the petitioner shall be directed against said body or officer and against said other party, each of whom shall have a right of appeal under section one D of chapter two hundred and thirteen. (As amended through St. 1963, c. 661, § 1.)

Rules and Regulations of the Police Department of the City of Medford.

CHAPTER III.

SECTION 16. Members and employees of the Department shall communicate promptly to the Commanding Officer all crimes, suicides, attempted suicides, fires, accidents, and all important happenings, complaints, and information of which the Department takes cognizance, which may come to their attention. Any member or employee withholding "tips" or information with a view to personal achievement or for any other reason shall be subject to charges.

SECTION 92. Members having information regarding any felony, or any person wanted on a felony charge, shall immediately give all details to their Commanding Officer.

SECTION 93. Members shall report all suspected violations coming to their attention, as well as all information they may get about any violation or suspected violation.

APPENDIX C.

April 14, 1969

The Honorable Raymond S. Wilkins,
Chief Justice of the Supreme Judicial Court
1300 Courthouse,
Boston, Massachusetts 02108

Re: Silverio v.
Municipal Court of the City of Boston, No. S-14,182

My dear Mr. Chief Justice:

Petitioner respectfully seeks rehearing or revision of the opinion on two points in the above case.

On page 12, lines 2-3, the Opinion of the Court states, "Neither the attorney [for Silverio] nor Silverio testified as to advice given or state of mind at any of the three hearings." This statement, I respectfully submit, is not accurate. I call the Court's attention to the testimony of Attorney John Zamparelli before the Special Justice of the Municipal Court of the City of Boston appearing at pages 12 through 14 of Appendix A to the Petitioner's Reply Brief. At this hearing, Mr. Zamparelli testified as to the advice that he had given Mr. Silverio (13-14):

> Q. Did you advise Mr. Silverio that he could not answer any questions to his superior officer that in any way pertain, or cover testimonies that he had given before the Grand Jury?
> A. I did.
> Mr. Gallagher. I object. It's all in the record.
> The Court. Well, if it's in the record, I will note your objection on whether he did advise Mr. Silverio. I will look in the record. You can answer, that I advised him not to answer.
> Mr. Gallagher. I pray your Honor's judgment.
> The Court. Yes or no.

The Witness. Yes, I advised him. Yes, I advised him accordingly.

Q. Did you advise Silverio that he could not tell his superior officer whether or not he had appeared as a witness before the Grand Jury?

A. I believe I did. Anything that pertained to the Grand Jury he couldn't answer.

Q. And did you give this advice on the basis of your understanding of the law of Massachusetts?

A. Yes. —based on the secrecy of the Grand Jury."

The above testimony shows that there was a disclosure by the attorney as to the advice he had given his client. It is true that the attorney never testified as to his "state of mind" at this hearing. However, the Court will note at page 13 that the Judge of this Court refused to hear such testimony:

> "The Court. I have taken his testimony, but I am not going to get into what went through his mind. I will exclude that question."

We also respectfully call the Court's attention to its failure to consider in the Opinion petitioner's contention (B.S. 17-18) raised in his petition (paragraph 10 (e)) that his removal was "unconstitutional. . . . . by violating the petitioner's right to privacy." Petitioner has consistently argued and never waived this point, and, therefore, respectfully requests that it be considered by the Court.

Respectfully,

DAVID BERMAN

DB/b ZAMPARELLI AND WHITE

cc Mark E. Gallagher, Jr., City Solicitor
Howard Miller, Esq., Asst. Attorney General

APPENDIX D.

SUPREME JUDICIAL COURT
BOSTON 8, MASSACHUSETTS

RAYMOND S. WILKINS
Chief Justice

April 15, 1969

David Berman, Esquire
100 Salem Street
Medford, Massachusetts 02155

Dear Sir:

Your request for rehearing in case No. 14,182, *Silverio* v. *Municipal Court of the City of Boston,* has been received and will be considered by the full court.

Yours truly,
R. S. WILKINS
Chief Justice

cc: Mark E. Gallagher, Jr., City Solicitor
Howard M. Miller, Assistant Attorney General
Robert J. Blumsack, Esquire

SUPREME JUDICIAL COURT
BOSTON 8, MASSACHUSETTS

RAYMOND S. WILKINS
Chief Justice

April 18, 1969

David Berman, Esquire
100 Salem Street
Medford, Massachusetts 02155

Dear Sir:

Your request for rehearing in case No. 14,182, *Silverio* v. *Municipal Court of the City of Boston,* has been considered by the full court and is denied. A change, however, has been made in point 5 of the opinion.

Yours truly,
R. S. WILKINS
Chief Justice

cc: Mark E. Gallagher, Jr., City Solicitor
Howard M. Miller, Assistant Attorney General
Robert J. Blumsack, Esquire

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In the Supreme Court of the United States.

OCTOBER TERM, 1969.

No. 349.

SALVATO J. SILVERIO,
Petitioner,
v.
MUNICIPAL COURT OF THE CITY OF BOSTON AND CITY OF MEDFORD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

BRIEF FOR THE RESPONDENT MUNICIPAL COURT OF THE CITY OF BOSTON IN OPPOSITION.

ROBERT H. QUINN,
Attorney General,
JOHN WALL,
Assistant Attorney General,
Chief, Criminal Division,
EDWARD W. HANLEY III,
Assistant Attorney General,
Attorneys for Respondent,
373 State House,
Boston, Massachusetts 02133.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

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Rules and Regulations of the Police Department of the City of Medford, chapter III, §§ 16, 92, 93 2n., 3n.

In the Supreme Court of the United States.

OCTOBER TERM, 1969.

No. 349.

SALVATO J. SILVERIO,
Petitioner,
v.
MUNICIPAL COURT OF THE CITY OF BOSTON AND CITY OF MEDFORD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

BRIEF FOR THE RESPONDENT MUNICIPAL COURT OF THE CITY OF BOSTON IN OPPOSITION.

Opinion Below.

The opinion of the Supreme Judicial Court is reported at 1969 Mass. Adv. Sh. 691 and 247 N.E. 2d 379.

Jurisdiction.

The judgment of the Supreme Judicial Court was entered on April 10, 1969, and modified, after a request for rehearing, on April 18, 1969. The request for a rehearing was

denied on April 18, 1969. The jurisdiction of the Court is invoked under 28 U.S.C. 1257 (3).

Question Presented.

Whether a police officer can properly be discharged for refusing to answer the questions of his superior officer relating to his knowledge of the involvement of persons in criminal activity?

Statement.

Petitioner was a patrolman in the police department of the City of Medford (R. 5)[1] prior to his discharge on March 30, 1965 (R. 6). On March 16, 1965, the acting chief of police (O'Leary) requested, by a letter hand-delivered to petitioner, that he report to his office at 2:00 in the afternoon on the following day (R. 5, 7). Accompanied by counsel, petitioner appeared at the designated time (R. 5). Present were O'Leary, Mr. Gallagher (the city solicitor) and one Conri (a police lieutenant who was head of the vice squad) (R. 8, 9). The conference was transcribed by a police stenographer (R. 5). O'Leary told petitioner that the purpose of the meeting was ". . . to find out what you can tell us, you can tell me as your superior officer in the discharge of your duties under the Rules and Regulations of the Police Department[2] as to whether things

[1] The letter "R" followed by a number is a reference to pages in the record of the Supreme Judicial Court now on file in this Court.

[2] The relevant portions of chapter III of the Rules and Regulations of the Police Department of the City of Medford are as follows:

"§ 16. Members and employees of the Department shall communicate promptly to the Commanding Officer all crimes, suicides,

have gone on in this city which you should have reported" (R. 10).

Petitioner was then asked a series of questions concerning his knowledge of certain persons who were involved in an auto theft ring involving them and three other Medford policemen who were under indictment (R. 8-15). Additionally, he was asked whether he himself had been summoned by the grand jury, had reported to the grand jury to testify, or had refused to testify, and, if he had refused to testify, on what grounds such refusal had been made (R. 12-13).

The interrogation concluded with the following questions (R. 14):

> "Do you have any information regarding any felony or any person wanted on a felony charge?
>
> "Do you have any suspected violations you wish to report?"[3]

---

attempted suicides, fires, accidents, and all important happenings, complaints, and information of which the Department takes cognizance, which may come to their attention. Any member or employee withholding 'tips' or information with a view to personal achievement or for any other reason shall be subject to charges.

"§ 92. Members having information regarding any felony, or any person wanted on a felony charge, shall immediately give all details to their Commanding Officer.

"§ 93. Members shall report all suspected violations coming to their attention, as well as all information they may get about any violation or suspected violation." (R. 22).

[3] Petitioner was asked the following questions (R. 10-14):

1. "Do you know William McGovern of 230 Gaston Street, Medford?"
2. "Do you know William McGovern of 230 Gaston Street, Medford?"
3. "Have you ever been to his house in Medford?"
4. "Have you ever visited his place of business in Charlestown?"
5. "Have you ever done any business with him?"
6. "Do you know Richard M. Penta, formerly of Medford and now of Peabody?"

The petitioner refused to answer all questions on the advice of his counsel on the proffered ground that to do so would be violative of his duty to maintain the secrecy of grand jury proceedings (R. 11, 13, 14).

Thereafter, on March 22, 1965, the appointing authority (the city manager of the City of Medford), acting pursuant to G.L. c. 31, § 43 (a), served petitioner with a "Notice of Hearing" to determine if he should be discharged, removed or suspended from office and therein charged him with conduct unbecoming a police officer and insubordination towards a superior officer (R. 15-16). At the hearing on March 26, 1965, the appointing authority found petitioner guilty as charged and ordered him discharged (R. 17-20). Petitioner, through his attorney, then appealed

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7. "Have you ever associated with him, either in a business way or a social way or in any way?"
8. "How long have you known him?"
9. "Do you know Thomas Howard of Fulton Street, Medford?"
10. "Have you had business dealings or association with him in any way?"
11. "How long have you known him?"
12. "Do you know whether or not they have a criminal record?"
13. "You were recently summonsed to appear before the grand jury, is that true?"
14. "Did you report to the grand jury at some time?"
15. "Did you go into the grand-jury room?"
16. "Were you sworn as a witness in the grand-jury room?"
17. "Did you take the witness stand in the grand jury room?"
18. "Were you asked a question or questions?"
19. "Do the questions that you refused to testify to have anything to do with suspected automobile thefts or receiving stolen property, namely automobiles, in connection with people known to you, including yourself?"
20. "Did you claim the Fifth Amendment to any questions asked you before the grand jury?"
21. "Did you refuse to testify before the grand jury on the grounds that it might incriminate you?"
22. "Do you have any information regarding any felony or any person wanted on a felony charge?"
23. "Do you have any suspected violations you wish to report?"

to the Civil Service Commission and requested a private hearing (R. 20). The hearing of April 16, 1965, was conducted before a hearing officer who made findings of fact and recommended to the Civil Service Commission that the appointing authority's action be sustained (R. 20-23).

No evidence was offered as to the substance of any of the proceedings before the grand jury. The hearing officer found in part ". . . no legal justification for . . . [petitioner's] silence, where, as in this case, a higher duty demanded by the rules and regulations of his employment calls for him to give information to a superior officer, particularly where the information sought in no way seeks to invade the secrecy of the Grand Jury proceedings themselves, but only information as to his conduct before the Grand Jury" (R. 23). He thus found that petitioner was guilty of conduct unbecoming a police officer (R. 23).

Thereafter the Civil Service Commission voted to accept the report of the hearing officer and to adopt his findings as those of the Commission and concluded that the action of the appointing authority in discharging petitioner was justified (R. 24).

On petition to the Municipal Court of the City of Boston pursuant to G.L. c. 31, § 45, the decision of the Civil Service Commission was affirmed (R. 6). The petitioner then filed a petition for a writ of certiorari in the Supreme Judicial Court which dismissed the petition after the hearing.

Argument.

1. The refusal of petitioner to respond to questions designed to elicit information as to whether he had knowledge of the commission of a crime constituted a breach of his duties as a police officer. Petitioner refused to answer

all questions posed to him except to acknowledge the receipt of a Rule Book (R. 10).

Questions 1 through 12 (fn. 3, *supra*) related to whether or not petitioner knew three individuals and the nature of his association with them, if any. These three individuals were involved in an auto theft ring involving them and three other Medford policemen who were then under indictment (R. 22). The next series of questions (Nos. 13-21, fn. 3, *supra*) related to the conduct of petitioner before the grand jury.

The questioning concluded (R. 14) with the questions (fn. 3, *supra*):

> "Do you have any information regarding any felony or any person wanted on a felony charge?
>
> "Do you have any suspected violations you wish to report?"

In all instances petitioner stood mute. The questions were designed to determine the extent of petitioner's knowledge of criminal activity. Public trust placed in the hands of a police officer requires nothing less than full candor in divulging of information, whether it be obtained from personal sources or in connection with the official duties of a police officer. The duty was imposed on petitioner as an incident of his status as a police officer, as well as by the rules and regulations of the police department of the City of Medford. In the case of *Huntoon* v. *City of Quincy*, 349 Mass. 9, 14 (1965), the Supreme Judicial Court stated:

> "Important among the many duties of police officers, for the protection of the public, are the prevention and detection of crime and the apprehension of criminals."

Nonetheless, petitioner raises several defenses or justification for his refusal to respond to the questions of his superior. Each of those arguments should be rejected and will be considered hereinafter.

2. The failure to discharge his duties by answering the questions posed by his superior officer relating to his duties warranted petitioner's dismissal even though the answers to these questions might have tended to incriminate him. *Gardner* v. *Broderick, Police Commissioner of the City of New York,* 392 U.S. 273, 278 (1968); *Uniformed Sanitation Men Assn., Inc.* v. *Commissioner of Sanitation of the City of New York,* 392 U.S. 280, 284 (1968).

Given the decisions in *Spevack* v. *Klein,* 385 U.S. 511 (1967) and *Garrity* v. *New Jersey,* 385 U.S. 493 (1967) on the one hand, and *Gardner, supra,* and *Uniformed Sanitation Men Assn., Inc., supra,* on the other hand, public officials may be discharged for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices. See concurring opinion of Mr. Justice Harlan in *Uniformed Sanitation Men Assn., Inc., supra.* While the discharge proceeding of petitioner antedated these cases, the procedural formula approved by these cases was followed.

3. Petitioner argues that he could have left himself open to punishment for contempt by answering the questions of his superior officer (fn. 3, *supra;* R. 10 *et seq.*). However, petitioner's view of the law was clearly erroneous. Only one of the questions asked petitioner could arguably be related to his testimony before the grand jury (fn. 3, *supra,* No. 13). The questions related only to the petitioner's conduct before the grand jury which is not within any general policy of secrecy. *Commonwealth* v. *Hill,* 11 Cush. (Mass.) 137, 140 (1853).

Even if factually the answers might have touched on matters within the general policy of secrecy of grand jury proceedings, that policy is inapplicable to a witness, and even if it does apply to a witness, it did not apply to petitioner in the discharge of his duties as a police officer. Regardless of what the law might be in other jurisdictions, in Massachusetts the oath of secrecy only goes to the jurors (G.L. c. 277, § 5). The obligation of secrecy is found in and limited by statute. This limitation was recognized in the case of *Commonwealth* v. *Geagan,* 339 Mass. 487, 497-498 (1959), where the Massachusetts Court noted that the duties of grand jurors are prescribed only by the statute setting forth their oath of office. Also see *Commonwealth* v. *Hill, supra.* Accordingly, the Massachusetts Court in *Commonwealth* v. *Geagan, supra,* held that the issuance of statements by state and federal officials disclosing what witnesses summoned before the grand jury would testify to or had testified to was not sufficient grounds to quash an indictment.

Furthermore, petitioner, when asked to respond to the questions of acting chief O'Leary, did not simply occupy the status of a "witness" asked to relate idle conversation. He was a police officer charged with the duty of divulging all information regarding crimes to his superiors. It, therefore, is irrelevant even if the general obligation of secrecy does apply to a witness. In many instances, the obligation of secrecy must give way to a higher duty. Thus, in the case of *Commonwealth* v. *Doherty,* 353 Mass. 197, 208 (1967), the Massachusetts Court noted that the fact that a witness had previously testified before a grand jury would be irrelevant to his decision whether to be interviewed by defense counsel.

In *United States* v. *American Tobacco Co.* 177 Fed. 774, 776 (W.D. Ky. 1910), it was held that there was no ground

for abating an indictment where an assistant district attorney made stenographic notes in the grand jury room of testimony and afterwards, while the investigation was still in progress, read them to the district attorney and an attorney for the government who was also participating in the case.

Also, in the case of *United States* v. *United States District Court,* 238 F. 2d 713 (C.A. 4th Cir. 1956), cert. den. sub nom. *Valley Bell Dairy Co.* v. *United States,* 352 U.S. 981, it was found to be error for a district judge, *inter alia,* to have forbidden counsel for the government to have a grand jury transcript to be used in conference with his superiors in the Department of Justice. The Court stated, at 721:

> "There is nothing in the reason of the rule requiring secrecy of grand jury proceedings which precludes counsel assisting in the investigation from having a transcript of the testimony which they have produced before the grand jury or consulting with their superiors in regard thereto."

Information which a police officer obtains and is required to furnish his superiors does not otherwise become secret because that officer may have happened to give this information to a grand jury. To so hold would seriously jeopardize the efficient administration of justice and create an artificial rule not founded in law or logic. Indeed, the effect of petitioner's argument would be to insulate from any other inquiry any matter which had once been disclosed to a grand jury. The grand jury investigative power would thus be turned into a power to foreclose inquiry as to matters which were required to have been divulged prior to grand jury proceedings.

4. Even assuming, *arguendo,* that there is some factual basis to petitioner's argument that he thought that he might be subjected to some form of punishment for answering his superior's questions, his discharge must still stand. Arguments similar to that made by the petitioner have been rejected by this Court. *Sinclair* v. *United States,* 279 U.S. 263 (1929); *Braden* v. *United States,* 365 U.S. 431 (1961), at 437-438.

In *Sinclair,* this Court stated, at 299:

> "There is no merit in appellant's contention that he is entitled to a new trial because the court excluded evidence that in refusing to answer he acted in good faith on the advice of competent counsel. The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt. There was no misapprehension as to what was called for. The refusal to answer was deliberate. . . . *His mistaken view of the law is no defense.*" (Emphasis supplied.)

5. Petitioner's argument that the rules are unconstitutionally vague is far from the mark. Firstly, it should not be in issue before this Court because petitioner never placed it in issue in the discharge proceedings. Petitioner did not see fit at any point to declare that he did not in fact understand the rules and regulations or what they required of him. Secondly, the rules and regulations are not obscure, and ordinary men, or at least policemen of common intelligence, are able to understand their meaning. Thirdly, the rules are not of such a nature that a criminal penalty is prescribed for their violation. The enforcement and interpretation of the rules is in the first instance left to the appointing authority. Cf. *Cleary* v. *Cardullo's Inc.* 347 Mass. 337, 344 (1964).

Lastly, as we have already argued, the duty of petitioner to respond to the questions of his superior was an incident of his office above and beyond any duty previously established by the rules and regulations of the police department. Therefore it is hardly relevant that the rules and regulations were unclear, if indeed they were. A policeman is clearly obligated to respond to these questions of his superior designed to elicit the extent of his knowledge of a crime and his discharge is, therefore, warranted for the violation of that duty even in absence of a specific rule or regulation. Cf. *Meehan* v. *Macy*, 392 F. 2d 822, 835 (C.A. D.C. 1968). For these various reasons, this argument of petitioner also does not warrant further review.

6. We have argued that petitioner was discharged for failing to answer all the questions in totality. Since petitioner's total failure to answer all questions was assigned as reason for his discharge it seems unnecessary to consider whether or not certain individual questions were improper; to wit, the question concerning petitioner's knowledge of certain persons. Petitioner's argument regarding any right of association therefore is irrelevant, but nonetheless, since it is an argument which lends itself to disposition on its own merits, we shall consider it briefly.

If perhaps petitioner had been discharged merely because of his personal associations, this argument might have some force.[4] But, he was discharged because he

[4] See, however, *Sullivan* v. *Municipal Court of Roxbury District*, 322 Mass. 566 (1948), wherein an off-duty police officer was taken into custody along with persons who had allegedly committed a crime, and the Court at page 576 said that:

"Conduct becoming a police officer demanded that he should instantly dissociate himself from his companions and clearly align himself on the side of law and order."

failed to respond to the proper inquiries of his superior. The persons who were the subject of the inquiry had been indicted for their participation in an auto theft ring involving them and three other Medford policemen. The interests of the public and the police in determining the fitness of its police officers to serve and in determining whether or not crimes have been committed is sufficiently compelling to subordinate any unlimited right to association. Cf. *Uphaus* v. *Wyman*, 360 U.S. 72, 81 (1959). Whatever petitioner's constitutional right to freedom of association is when considered in the abstract, it is clear that he has no constitutional right to be a policeman under these circumstances. This argument of petitioner also does not warrant further review.

Conclusion.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. QUINN,
Attorney General,
JOHN WALL,
Assistant Attorney General,
Chief, Criminal Division,
EDWARD W. HANLEY III,
Assistant Attorney General.

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Supreme Court of the United States.

OCTOBER TERM, 1969.

No. 349.

SALVATO J. SILVERIO,
Petitioner,
v.
MUNICIPAL COURT OF THE CITY OF BOSTON AND CITY OF MEDFORD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

BRIEF FOR RESPONDENT CITY OF MEDFORD, MASSACHUSETTS, IN OPPOSITION.

The City of Medford opposes the issuance of a writ of certiorari to review a judgment of the Supreme Judicial Court of Massachusetts.

Opinion Below.

The opinion of the Supreme Judicial Court, reported at 1969 Mass. Adv. Sh. 691 and 247 N.E. 2d 379, is printed

as Appendix A (A. 22)[1] of the petition. The opinion was originally dated April 10, 1969, but, after a request for rehearing, it was modified on April 18, 1969. The request for a rehearing was denied on April 18, 1969.

Questions Presented.

1. Should this Court exercise its discretion by granting a petition for writ of certiorari to the Supreme Judicial Court of Massachusetts on the record of this case?

2. Would a hearing of this case on the merits provide a valuable precedent?

Statement.

This petition for the issuance of a discretionary writ arises out of a Civil Service matter in the City of Medford, Commonwealth of Massachusetts. The matter was heard originally before the Appointing Authority of the City of Medford, the City Manager (R. 17), and his decision removing the police officer was appealed to the Civil Service Commission. A hearing officer heard the matter *de novo,* and upon his report (R. 20) to the Commission it upheld the decision of the Appointing Authority (R. 24). The employee then asked for a review (A. 34) by the Municipal Court of the City of Boston. This review included some fresh evidence in minor part, but chiefly concerned itself with the Civil Service record. The decision on review upheld the Civil Service Commission. The employee then,

[1] The letter "R" followed by a number is a reference to pages in the printed record in the Supreme Judicial Court. The letters "A," "B," "C," and "D" followed by numbers refer to appendices to the current petition. The letter "P" followed by a number refers to pages in the said petition.

naming the Municipal Court of the City of Boston as the respondent, filed a petition for a writ of certiorari with the Supreme Judicial Court of Massachusetts which issued an opinion and judgment denying the petition (A. 22). The City of Medford, which has a real interest in the outcome of this petition, participated in all stages of the proceedings.

This matter began at a routine level of departmental inquiry or administrative proceeding. A police officer (petitioner) was requested in writing to report to his superior officer (R. 7). When he came to the police station in response to this request he had with him a stenographer and a lawyer (R. 10) and, apparently, the undisclosed knowledge that three fellow officers were under indictment for car thefts, and that he had been to the Grand Jury room but was not under indictment (R. 8).

The petitioner's stenographer was excused from the departmental inquiry, but his attorney was allowed to remain, presumably on the condition that he would say nothing (R. 10). The employee-police officer was advised by the Acting Chief of the Police Department that this was a departmental inquiry, not a criminal proceeding, the purpose of which was to find out what he could tell his superior officer about "whether things have gone on in this city which you should have reported" (R. 10).

The petitioner admitted receiving his departmental Rule Book (Return, p. 11), in response to a question from the Acting Chief. He was then asked if he knew a William McGovern, and he refused to answer. (The Civil Service hearing officer inferred that the said McGovern was in the auto-theft ring, R. 22.)

The question about the Rule Book was the last question the officer answered, except one (R. 14) when he and his counsel collaborated on an answer and non-answer.

The approximately twenty-two questions which followed,[2] he continually refused to answer (R. 10-15). They had to do with the application of portions of the City of Medford Police Rules (R. 22), sections 16, 92 and 93. These rules generally establish the requirement that a member of the said Police Department must report all information which might be pertinent to the conduct of the affairs of the Department and its investigation of crime.

None of the questions asked of him called for an answer repeating his testimony before the Grand Jury. The questioner carefully avoided any confrontation with a problem of Grand Jury secrecy, if any there be so far as a witness is concerned, by obviously limiting the scope of the questioning solely to the conduct of the officer. He, the officer, nevertheless refused to say whether or not he had been summoned to appear before the Grand Jury, or whether he reported to or entered the Grand Jury room. He refused to say whether or not he was sworn as a witness or whether he testified or refused to testify in the Grand Jury room.

On each occasion counsel for the petitioner advised the petitioner to remain mute, and it was stated that he claimed a privilege to do so because of some instruction given him by some person, not identified, relative to the secrecy of the Grand Jury (R. 13). No privilege against self-incrimination was claimed.

This is the basic situation which led to the discharge of the police officer (R. 18-20), for conduct unbecoming a police officer and for insubordination.

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[2] The questions have been printed in various portions of the record before this Court. The complete series are to be found in the reservation and report presented to the Supreme Judicial Court, herein called the "Record," and referred to by letter "R" followed by a number.

Comment on the Petitioner's "Questions Presented."

With regard to the first question presented by the petitioner (P. 2), it should be pointed out that the questions asked the police officer did not relate to his testimony but to his conduct, and the distinction was noted by the Supreme Judicial Court of the Commonwealth of Massachusetts (A. 26, l. 5).

The second part of the petitioner's first question is similarly misleading in that it contains a matter not in the record; namely, the state of mind of the attorney representing the petitioner and, furthermore, is misleading in that nowhere does it appear in the record with certainty that the petitioner relied on his attorney in assuming his position of not answering. Page 13 of the record states that the witness had been instructed, by whom it does not say, not to discuss any Grand Jury questions with anyone, including his counsel. Under these circumstances, it is not at all clear from whom he got such advice. It could have been from characters who have no connection whatsoever with the Court and not his counsel.

Question No. 2 is misleading as stated, in that it would seem to imply that the reason for discharge was based solely on the refusal to disclose whether or not a privilege against self-incrimination, in the Grand Jury proceeding, had been claimed by the police officer.

Question No. 3 is an interesting one, but moot in that there is no evidence of a claim of the privilege against self-incrimination in the case. The nearest the petitioner came to making a claim of the privilege was by reference in his original pleadings which are not evidence (R. 4).

In regard to question No. 4, appearing on page 2 of the petition, there was no claim of First Amendment rights at all anywhere in the record. The police officer stood mute (R. 11).

Question No. 5 assumes that the Fourteenth Amendment was claimed. It was not, and no timely claim of vagueness was raised (P. 26).

Argument.

This Court, in its Rules, has stated that it will exercise its discretion by ordering a writ to issue after a petition for a writ of certiorari has been made only where there are special and important reasons therefor. Rules of the Supreme Court of the United States, Rule 19, p. [illegible].

In the mixed bag of "Record," and "Non-record" material submitted in the within petition, it may be somewhat difficult for the Court to sort out the record in making its decision. However, an examination of the printed record in the Supreme Judicial Court and its opinion based thereon, and its elimination of certain parts of the earlier printed record as being specifically not a part of the record (A. 30), leave clear an opportunity for discussion. Parenthetically it should be noted that there is nothing claimed in this Court relative to a failure to grant a rehearing, so that detail may be eliminated. It is submitted this will leave for the consideration of this Court a record composed of the following:

1. The printed record accompanying this petition.
2. The decision made a part of this petition.
3. The petition.

I. The Record Shows No Apparent Error of Law.

a. The extent of secrecy of Grand Jury proceedings required would be a matter of local determination and generally would be its determination as to what is contempt.

Such matters are commonly left to the local courts by this tribunal and the local decision is regarded as conclusive.

> *Johnson* v. *New Jersey,* 384 U.S. 719.
> *Patterson* v. *Colorado, ex rel. Attorney General of the State of Colorado,* 205 U.S. 454.

In any event the law is clear in Massachusetts that no witness is sworn to secrecy and no violation punishable by contempt is possible, and no cases support any other position (A. 25-26).

b. Reliance on such a non-existent reason, *i.e.,* fear of violating the secrecy of the Grand Jury room, cannot support a claim of the privilege against self-incrimination. There must be potentially a genuine criminal violation somewhere in the wings.

> See *Uniformed Sanitation Men Assn. Inc.* v. *Commissioner of Sanitation of the City of New York,* 392 U.S. 280, 284 (1967).

c. The record shows that the police officer's refusal to answer was a deliberate, calculated act. It was a withholding from appropriate authority of information considered pertinent, withheld by a police officer who had long training in what his duties required.

> See *Uniformed Sanitation Men Assn. Inc.* v. *Commissioner of Sanitation of the City of New York,* 392 U.S. 280, 285 (1967).
> *State of New Jersey* v. *Naglee,* 44 N.J. 209, 207 A. 2d 689, 695.

d. Nothing in the record shows an invasion of constitutional rights, directly or indirectly.

II. The Case does Not Lend itself to an Impressive Precedent.

The right of a police officer to have counsel at a departmental inquiry, or the right of a police officer to remain silent when queried by his superior officer in the absence of any threat or coercion merely because he imagines he is in trouble, or the extent of the right to rely on the competence of counsel, might have had some universality or novelty that would merit settlement.

Unfortunately in this case, the permissible inferences are so numerous and the facts so obscured, that no clear-cut reading is entirely possible. For example, the silence of the police officer is consistent with advice to avoid claiming the privilege of self-incrimination rather than relying on the advice of counsel as to the secrecy of the Grand Jury; in point of fact it is not clear that he relied on counsel *at all* for advice. He may have used counsel just for support, since the advice according to the record may have come from others; the alleged irrelevancy or vagueness of the questions vis-á-vis the rules and regulations was never challenged, so that any chance of resolving an ambiguity on the scene was lost. The ambivalent attitude of counsel as being merely a spectator, and then a legal advisor, would seemingly avoid a judicial analysis of his role in this matter (R. 9).

Conclusion.

The respondent City of Medford respectfully submits that the petition for a writ of certiorari to the Supreme Judicial Court in Massachusetts should be denied for the reason that there is no error apparent on the record, and further, because there is nothing a hearing on the merits

in this case would present as a novel issue for the guidance of municipalities throughout the country in a clear-cut, useful way.

Accordingly, inasmuch as this is addressed to the Court's discretion, it is respectfully submitted the discretion should be exercised by a denial.

Respectfully submitted,

C. KEITH HURLEY,

MARK E. GALLAGHER.